IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PERRY ROBERT AVILA,

Plaintiff,

vs.

JEANNE WOODFORD, Director of Corrections; J. McGRATH, former warden; R. KIRKLAND, Warden; T. SCHWARTZ, Associate Warden; B. J. O'NEILL, Associate Warden; M. FOSS, Lieutenant; L. E. SCRIBNER, Captain; and D. CHRISTOPHERSON, Sergeant,

Defendants.
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No. C 05-2063 WHA (PR)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is a civil rights case filed pro se by a state prisoner. Defendants have moved for summary judgment. Plaintiff has opposed the motion and filed his own motion for summary judgment, which is opposed. For the reasons set forth below, defendants' motion for summary judgment is **GRANTED** and plaintiff's motion is **DENIED**.

DISCUSSION

I. PLAINTIFF'S MOTIONS

In addition to his motion for summary judgment, plaintiff has filed a combined motion to compel, for appointment of counsel, and to expedite consideration of his case.

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A previous request for "appointment" of counsel was denied; plaintiff has renewed the motion.

There is no constitutional right to counsel in a civil case. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district court only the power to "request" that counsel represent a litigant who is proceeding in forma pauperis. 28 U.S.C. § 1915(e)(1). This does not give the courts the power to make "coercive appointments of counsel." *Mallard v. United States Dist. Court*, 490 U.S. 296, 310 (1989). In short, the Court has only the power to ask pro bono counsel to represent plaintiff, not the power to "appoint" counsel.

Plaintiff has done an exceptional job of presenting his position, and clearly is not in need of counsel in the interests of justice. The motion will be denied.

In his motion to compel plaintiff fails to show that the material he seeks would have any bearing on the result here, which is straightforward and clear. The motion will be denied. The motion to expedite consideration is moot, as this ruling disposes of the case.

II. MOTIONS FOR SUMMARY JUDGMENT

A. STANDARD OF REVIEW

Summary judgment is proper where the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Ibid.*

The moving party for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986); *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the moving party has met this burden of production, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a genuine issue for

trial.. If the nonmoving party fails to produce enough evidence to show a genuine issue of material fact, the moving party wins. *Ibid.*

B. ANALYSIS

The warden of Pelican Bay State Prison promulgated an operational procedure barring "publications and correspondence written in the languages of Swahili, Nahuatl, Runic or Celtic." (Decl. Watkins, ex. D.) Plaintiff contends that his First Amendment rights were violated when he was not allowed to receive in the mail a book called "Myths of Mexico and Peru" because it contained Nahuatl, Mayan and "ancient Peruvian" words.

Prisoners retain those First Amendment rights not inconsistent with their status as prison inmates or with legitimate penological objectives of the corrections system. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Regulations limiting prisoners' access to publications or other information are valid, however, if they are reasonably related to legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

The Supreme Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment, but also that the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere. *Beard v. Banks*, 126 S. Ct. 2572, 2577-78 (2006). As was pointed out in *Overton v. Bazzetta*, courts owe "substantial deference to the professional judgment of prison administrators." 539 U.S. 126, 132 (2003). *Turner* reconciled these principles by holding that restrictive prison regulations are permissible if they are "reasonably related" to legitimate penological interests, and are not an "exaggerated response" to such objectives. *Turner*, 482 U.S. at 87.

In *Turner*, the Supreme Court identified four factors to consider when determining whether a regulation is reasonably related to legitimate penological interests: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted

constitutional right will have on guards and other inmates and on the allocation of prison resources generally"; and (4) the "absence of ready alternatives", or, in other words, whether the rule at issue is an "exaggerated response to prison concerns." *Turner*, 482 U.S. at 89-90. The *Turner* analysis applies equally to facial and "as applied" challenges. *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004).

To meet the first *Turner* factor, the governmental interest underlying a regulation restricting prisoners' First Amendment rights must be legitimate and neutral, and the regulation must be rationally related to that objective. *Thornburgh*, 490 U.S. at 414. A regulation restricting certain publications is "neutral" if prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security. *Id.* at 415-16.

The real task is not balancing the four factors outlined in *Turner*, but rather determining whether the state shows a reasonable relation between the policy and legitimate penological objectives, rather than simply a logical one. *Beard*, 126 S. Ct. at 2579-80. The district court must draw all justifiable inferences in the prisoner's favor by distinguishing between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, the court's inferences must accord deference to the views of prison authorities. *Id.* at 2578. Unless a prisoner can point to sufficient evidence showing the policy is not reasonably related to legitimate penological objectives to allow him to prevail on the merits, he cannot prevail at the summary judgment stage. *Id.*

Defendants assert that publications and communications containing Nahuatl words were banned because that language (and Swahili, Runic and Celtic) was being used by gang members like plaintiff to communicate securely. They have supported this contention with a declaration from Chief Deputy Warden M. D. Castellaw, who says that prison gang members have "over the last few years" used the banned languages to communicate, endangering the safety of the institution (decl. Castellaw at ¶ 5-6). Nothing in plaintiff's filings refutes this.

It is generally the state's burden to establish a rational relationship between its limiting regulation or policy and the legitimate penological objectives it asserts, *Beard*, 126 S. Ct. at

2581-82, but if there is a "common-sense" connection between the regulation and the objective, the inmate must first show evidence to rebut this reason, and only then does the state have the burden of presenting counter-evidence, *Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999). In this case the undisputed facts are sufficient to meet defendants' burden, plus there is a common-sense connection between the regulation and the objective which has not been rebutted by plaintiff. Defendants have satisfied the first *Turner* factor.

The second *Turner* factor is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 89-90. Consideration of this factor requires that the right in question be viewed sensibly and expansively. *Thornburgh*, 490 U.S. at 417. Regulations restricting certain publications generally will satisfy this factor if they permit "a broad range of publications to be sent, received, and read." *Id.* at 418. The issue is whether there are any alternative means available to the prisoners. *See, e.g.*, *Mauro*, 188 F.3d at 1061 (although policy bans all sexually explicit materials depicting frontal nudity, it does not ban sexually explicit letters between inmates and others, nor does it ban sexually explicit articles or photographs of clothed females); *Stefanow v. McFadden*, 103 F.3d 1466, 1474 (9th Cir. 1996) (even though prisoner banned from reading particular publication, alternative means of exercising First Amendment rights remain available where access to material which does not violate prison security policy unaffected). Given that plaintiff was not barred from reading books in languages other than those banned, defendants have established that this factor cuts in their favor.

The third *Turner* factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." Castellaw says in his declaration that if communications in Nahuatl is not banned, it is necessary to look up each word in a dictionary(decl. Castellaw at ¶ 7). The impact of this on the allocation of prison resources is obvious. Thus the result as to the third factor also favors defendants.

The fourth *Turner* factors is whether there are "ready alternatives", or, in other words, whether the rule at issue is an "exaggerated response to prison concerns." There are no obvious

ready alternatives that would involve less intrusion on plaintiff's First Amendment rights.

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Plaintiff points out that prison regulations say that mail in languages other than English is permitted, and makes much of the fact that Nahuatl is a "language other than English," not a code. *See* Cal. Code Regs. tit. 15, § 3146. This is a distinction without a difference, as the Marine Corps' use of the Navaho Code-Talkers in World War II illustrates. When a language is sufficiently obscure, it can and does function as a code. And in any case the state's regulations do not control what First Amendment rights plaintiff has; that is a matter of federal law.

Applying that federal law, the Court concludes that the *Turner* factors all clearly favor defendants, so their seizure of plaintiff's books did not violate his First Amendment rights.

CONCLUSION

Plaintiff's combined motion to compel, for counsel, and to expedite (document number 32 on the docket) is **DENIED**. For the foregoing reasons, defendants' motion for summary judgment (document number 30) is **GRANTED**. Plaintiff's cross-motion for summary judgment (document number 38) is **DENIED**. The clerk shall close the file.

IT IS SO ORDERED.

Dated: September 26, 2007.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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